

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

CVS PHARMACY, INC.

Employer/Petitioner

and

Case 13-UC-266228

TEAMSTERS LOCAL 727

Union

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board to determine whether it is appropriate to clarify the existing bargaining unit represented by the Union to exclude the position of Team Leader. Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board.¹

I. Issues and Parties Positions

The Employer/Petitioner seeks to clarify the existing bargaining unit to exclude the Team Leader position from the current unit on the basis that the employees holding that classification are supervisors under Section 2(11) of the Act. Specifically, the Employer takes the position that Team Leaders are supervisors of the pharmacy techs, pharmacy lead techs and student pharmacy interns because they possess authority over them to hire, discipline, discharge, transfer, promote, discharge, assign, and responsibly direct, as well as other secondary indicia of supervisory status.

The Union does not take a position regarding the supervisory status of the Team Leaders. Rather, the Union argues that based on its disclaimer of representation of the Team Leaders and its conduct consistent with its disclaimer, unit clarification is not appropriate because there is no ambiguity regarding the unit and, therefore, the Employer's petition must be dismissed.

¹ Upon the entire record in this proceeding, I find:

- a. The hearing officer's rulings, made at the hearing, are free from prejudicial error and are hereby affirmed.
- b. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The parties stipulated and I find that the Union is a labor organization within the meaning of the Act.
- d. A question affecting commerce exists.

II. Decision and Order

Based on the evidence adduced at the hearing and the relevant case law, I find that the Union acted inconsistently with its disclaimer of representation of the Team Leaders by requesting the Employer to execute a collective-bargaining agreement containing representational language for the Team Leaders such that the Employer's petition for clarification is appropriate. I further find that based on its uncontested evidence of supervisory status, the Employer has met its burden to demonstrate that the Team leaders are statutory supervisors within the meaning of Section 2(11) of the Act and thus should be excluded from the bargaining unit represented by the Union.

Based on these findings, **IT IS HEREBY ORDERED** that the bargaining unit contained in the most recent collective bargaining agreement is clarified wherein the Union shall serve as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All registered pharmacists, graduate non-registered pharmacists, regularly employed part time graduate and registered pharmacists and student pharmacy interns in the retail drug stores operated by CVS/pharmacy listed on Appendix A.

Excluded: All Team Leaders, salaried managers, temporary employees, other contracted employees, office clerical employees, confidential employees, and professional employees, guards and supervisors as defined in the Act, and all other employees.

III. Statement of Facts

A. Employer's Operations and Bargaining History

The Employer operates pharmacies and retail stores in approximately 10,000 CVS stores² nationwide. In about 2006, the Employer purchased stores from Jewel-Osco Drug and assumed the 2006-2010 collective bargaining agreement (CBA) between Jewel-Osco and Local 714, Teamsters (Local 714). In 2009, Local 714 transferred its representation of the bargaining unit to the Union. The Employer and the Union have since negotiated two successor CBAs, one from 2010 to 2013, and another from May 4, 2013, to May 7, 2016. Since the expiration of the 2013-2016 CBA, the parties have engaged in negotiations resulting in a successor CBA which is the subject of unfair labor practice proceedings in Cases 13-CA-275412 and 13-CB-274947 as described further below. There is no dispute that per the recognition clause at Article 1 of the parties' successive CBAs, the Union has been the recognized bargaining representative of the following employees working in approximately 33 stores throughout the greater Chicago area:

"The Employer recognizes the union as the sole collective bargaining agent for all registered pharmacists, graduate non-registered pharmacists, regularly employed part time graduate and registered pharmacists and student pharmacy interns in the retail drug stores operated by CVS/pharmacy listed on Appendix E, excluding, however, all store

² The Employer also operates a number of pharmacies within Target stores in the U.S.

management, assistant store managers, manager trainees, all supervisors and guards as defined in the Act and all other employees.”

The Employer’s retail and pharmacy operations are divided into regions and districts. Regional Director of Operations Joe Haas is in charge of approximately 140 stores in the Chicago and Milwaukee area, including the 33 Union-represented stores herein. Haas reports to an unidentified Division Vice President who reports to an unidentified Senior Vice President of Field Operations. Reporting directly to Haas are District Leaders who are each in charge of about 10 to 20 stores.

The Employer’s retail and pharmacy operations are separate at each store. Regarding pharmacy operations, designated Team Leaders in charge of each Union-represented pharmacy report to a District Leader.³ The record is silent as to the number of Team Leaders assigned to each Union-represented store/pharmacy or the total number of Team Leaders at issue in this matter. All of the Team Leaders are qualified licensed pharmacists and perform the same pharmacist duties as the bargaining unit pharmacists in addition to their Team Leader duties described below. Pharmacy techs (techs), pharmacy lead techs (lead techs), and student pharmacy interns (interns) report directly to the Team Leaders. The techs and lead techs are separately represented by an unidentified union while the interns are part of the same bargaining unit including the Team Leaders and pharmacists.

There is no dispute that per the clause contained in the parties’ successive CBAs at Article 11, entitled “Team Leaders,” the parties have recognized the Team Leaders as bargaining unit employees:

“The Employer may designate staff pharmacists as Team Leaders. Team Leaders shall be bargaining unit members and shall performed bargaining unit work, primarily filling prescriptions.

Team Leaders shall perform those duties as may be assigned by the Employer. Such duties may include: budget responsibilities; work flow supervisor; directing the pharmacy staff; monitoring product sources, generic utilization, marketing promotions, competitor pricing, inventory control, [and] pharmacy reports; administration of company programs/policies; training; recommending personnel related action; communication to the pharmacy staff; and other duties. Team Leaders shall not be responsible for the decision to hire, discharge or otherwise discipline other pharmacists. ...”

The Employer also operates non-union pharmacies in addition to its Union-represented pharmacies in the greater Chicago area. Designated Pharmacy Managers are in charge of each non-union pharmacy. Like the Team Leaders, these non-union Pharmacy Managers are qualified licensed pharmacists and report to a District Leader. The duties of the Union-represented Team Leaders and the non-union Pharmacy Managers are the same and they have the same reporting relationships with regard to techs, lead techs and interns. Additionally, staff pharmacists report

³ The Team Leader position is also referenced in the record as Pharmacist-In-Charge (PIC) and Pharmacy Leader.

to Pharmacy Managers at non-union pharmacists.⁴ Recently, following the Union's disclaimer of representation of the Team Leaders, as more fully described below, the Employer changed the Team Leader classification to the Pharmacy Manager. However, the duties of the Team Leader position have not changed.⁵

Regarding retail operations, also referenced as "front-store operations," there are designated Store Managers in charge each store's retail operations who report to a District Leader. Store/shift supervisors who oversee store clerks and cashiers report directly to the Store Managers.

B. Procedural Background

On September 16, 2020, the Employer filed the instant petition seeking to exclude the position of Team Leader from the bargaining unit represented by the Union. By dismissal letter dated October 23, 2020, Region 13 Regional Director Peter Ohr dismissed the petition for clarification as untimely. Specifically, Regional Director Ohr noted that there was no assertion by the Employer/Petitioner of any recent changes to the job duties of Team Leaders to warrant upsetting the parties' agreement concerning the contractually agreed-upon unit placement of the Team Leaders. Thus, Regional Director Ohr found that the requested clarification was not appropriate "as there is no ambiguity of the placement of Team Leaders, there have been no substantial changes to the classification, and the parties are currently in negotiations." Thereafter, on February 5, 2021,⁶ as a result of the Employer's November 5, 2020, request for review of Regional Director Ohr's October 23, 2020, dismissal letter,⁷ the Board issued an Order Granting Review and Remanding this matter to the Region finding that "as long as the Petitioner can establish that the [Team Leaders] holding the disputed classification are Section 2(11) supervisors," then "the fact that the Team Leaders have been included in the unit by way of past contracts, as the Regional Director found, is not sufficient to support dismissal under these circumstances."⁸

By letter dated March 24 from Union Secretary-Treasurer John Coli to "Bargaining Unit Pharmacists," the Union advised the bargaining unit by mail that a ratification vote would be held on the Employer's last contract offer which included Article 11, "Team Leaders," in unchanged form from the expired 2013-2016 predecessor CBA.⁹ In this letter, the Union also specifically advised unit employees:

⁴ At the hearing, the Employer asserted that the Union-represented Team Leaders have also possessed some supervisory authority and leadership responsibilities over staff pharmacists, however, it only presented evidence of supervisory status with regard to the techs and lead techs.

⁵ For the sake of this decision, despite their recent re-classification to Pharmacy Manager, the disputed Team Leaders will be consistently referenced herein as Team Leaders.

⁶ All dates hereafter are in 2021 unless otherwise stated.

⁷ Although neither Regional Director Ohr's October 23 dismissal letter nor the Employer's November 5, 2020, request for review are part of the instant record, I take administrative notice of such.

⁸ The Board treated the Regional Director's dismissal letter as "the equivalent of a decision in reviewing the Employer's Request for Review under Sec. 102.67 and 102.63 of the Board's Rules and Regulations."

⁹ The Employer's "Last Proposal to Teamsters Local 272", dated March 12 and 37 pages in length, proposed a three-year CBA beginning on date of ratification.

“[the Employer] has continued to pursue a unit clarification petition which seeks to remove all Team Leaders (PICs) from the bargaining unit ...[and] the National Labor Relations Board overturned Region 13's dismissal of the claim, making the removal of Team Leaders unavoidable. ... Local 727 reached out to [the Employer] multiple times and proposed settlements that would allow Team Leaders to remain part of this bargaining unit; but ... all attempts to resolve this issue were ... rejected. The Union was then ... left few options outside of making the difficult choice to disclaim this part of the group.”

The Union provided bargaining unit employees with a copy of the proposed contract for review as well as ratification ballots with return envelopes to be returned to the Union by April 7.

By letter dated March 26 from Union Secretary-Treasurer Coli to the Employer, the Union undisputedly and unequivocally disclaimed representation of the Team Leader classification described in Article 11 of the parties' then-expired 2013-2016 CBA. By email dated March 31 from Employer Regional Director Haas to the Union-represented Team Leaders, the Team Leaders were advised that:

“As you know, last Friday Teamsters Local 727 disclaimed its representation of pharmacy Team Leaders. As a result, you are now non-union CVS employees. Effective immediately, CVS has designated you as Pharmacy Managers. Going forward, you will perform the full range of responsibilities that all other CVS Pharmacy Managers perform. In particular, you will be responsible for supervising the other pharmacists in your store, while continuing to perform your other existing duties. ... “

The Employer further advised the Team Leaders that “[o]ne other immediate change is that you will no longer be required to pay union dues; we have implemented a change in the payroll system to end those deductions.” The Union does not dispute that since its disclaimer, it stopped seeking dues for the Team Leaders and it has not filed any grievances or unfair labor practice charges specifically on behalf of the Team Leaders. Following the return of the April 7 ratification ballots, the proposed CBA was ratified. Thereafter, the Union sent a copy of the proposed CBA to the Employer which the Employer refused to sign.

By letter dated April 27, Region 13 Acting Regional Director Daniel Nelson issued a Decision and Order in this case advising the parties that the petition was dismissed based on the Union's March 26 unequivocal disclaimer of representation of the Team Leader classification “as described in Article 11 of the most recent [CBA].” The Region's Decision and Order further noted that “Petitioner is not aware of any conduct inconsistent with this disclaimer.” Thereafter, by letter dated May 13, following the Employer's May 11 request for review to the Board of the April 27 Decision and Order, Acting Regional Director Nelson revoked the April 27 Decision and Order and reinstated the Employer's clarification petition based on the Union acting “inconsistently with its disclaimer by, among other things, requesting the Employer in early April to execute a [CBA] containing representation language for the Team Leaders which is the classification the Union had just disclaimed interest in representing.” Thereafter, on May 24, Acting Regional Director Paul Hitterman filed a request to the Board to transfer the Employer's

May 11 request for review to the Region for reconsideration based on the new conduct raised. By Order dated May 25, the Board granted the Region's request by issuing its Order Granting That The Board Transfer The Employer's May 11, 2021, Request For Review To The Regional Director For Reconsideration. On May 26, Acting Regional Director Hitterman issued an Order revoking the April 27 Decision and Order and dismissal of the petition, finding that "additional proceedings are warranted because the Union is acting inconsistently with its disclaimer of interest in representing Team Leaders." The pre-election hearing was scheduled and conducted by the Region on June 7.

As noted, the parties' successor CBA is the subject of unfair labor practice proceedings in Cases 13-CA-275412 and 13-CB-274947. The charge in Case 13-CA-275412, filed by the Union on April 12, 2021, and amended on May 27, alleges that the Employer violated Section 8(a)(5) of the Act by refusing to bargain in good faith and execute the parties' CBA. The charge in Case 13-CB-274947, filed by the Employer on May 31 and amended on April 27, alleges that the Union violated Section 8(b)(3) of the Act by refusing to bargain in good faith and provide certain information.

C. The Team Leaders

The Team Leader classification has been in existence since about 2006 when the Employer acquired the Jewel-Osco stores. Team Leaders work in pharmacy operations along with staff pharmacists, techs, lead techs, and student interns. Like the staff pharmacists, the Team Leaders are licensed pharmacists responsible for filling and processing prescriptions for medications in accordance with the Board of Pharmacy for the State of Illinois and providing immunizations and medication consultation to prescribing patients/customers. In addition, the Team Leaders exercise additional responsibilities related to overseeing the techs and student interns, as further outlined below. The record does not address the number of Team Leaders in the bargaining unit or the number of techs overseen by each Team Leader. There is some scant record evidence regarding one Team Leader to whom nine employees report including five techs, one lead tech, two interns and one staff pharmacist;¹⁰ another Team Leader who oversees two techs; and another Team Leader who oversees five techs and one student intern.

The techs and lead techs who report to the Team Leaders are primarily responsible for inputting prescription data into the pharmacy computer network system and prescribing patient electronic files; retrieving medication-related items from pharmacy and store shelves, filling and labeling medication vials, and counting pills;¹¹ cash register/"point-of-sale" duties including charging and delivering medications to prescribing patients/customers; and making phone calls to prescribing patients regarding continued adherence to prescribed medications. The record is lacking in detail regarding the duties and responsibilities of the lead techs and interns. The lead techs have some additional responsibilities including scheduling and on-the-job training of techs and receive a wage increase upon their promotion. The interns are current pharmacy school students who support pharmacy operations and assist staff pharmacists.

¹⁰ The staff pharmacist has presumably reported to the Team Leader since the Employer's Team Leader conversion to Pharmacy Manager.

¹¹ Counting pills is officially known as "inventory management/cycle counts."

1. Authority to Hire

Based in part on monthly performance metrics provided to the Team Leaders regarding the performance status of their assigned store, the Team Leaders decide if there is a hiring need for additional techs. The Team Leaders commence the hiring process by opening a requisition for hire in the computer network system which automatically generates a tech job posting in the requisition file. The Team Leader who opens a requisition is responsible for reviewing applicant information that has been loaded and stored to the requisition file and deciding which applicants to contact applicants for job interviews. While the District Leader and/or another pharmacist sometimes provides support to Team Leader in the hiring process by, for example, sitting in on interviews of prospective techs and providing feedback, the Team Leaders make all final decisions regarding the hiring of techs. Hiring decisions by Team Leaders are not subject to approval by their superiors nor does anyone have veto power over their hiring decisions. Since 2017, about 319 techs have been hired by Union-represented Team Leaders into the Employer's 33 Union-represented stores.

2. Authority to Discipline, Up To and Including Discharge

The Employer administers a nation-wide progressive discipline policy for its employees consisting of four steps: step one is a verbal warning; step two is a written warning; step three is a final written warning; and step four is termination. Team Leaders record, issue and document all steps of progressive discipline for the techs to their electronic personnel files.¹² All written discipline is recorded on "Corrective Action," "Counseling," or "Performance Feedback" forms and stored in electronic personnel files kept in the Employer's MySuccess computer portal. Only the Team Leaders are able to generate discipline for techs and are designated as "supervisor" or "manager" on the various discipline forms.¹³ With regard to terminations, the Team Leader will generally consult with a "quasi-human resources" group called "advice and counsel" for consultation pertaining to the circumstances of the termination before making a final decision to terminate a tech. Notwithstanding this input from the advice/counsel group, the Team Leader is not required to obtain approval for employee terminations and ultimately decides independently whether termination is warranted. The record demonstrates that from March 2016 to May 2021, about 22 techs have been terminated by Union-represented Team Leaders for attendance infractions, ongoing performance-related issues, and violation of rules including "gross violations."

There is also some record evidence that Team Leaders have authority to remove discipline which has been improperly issued. For example, a tech who was disciplined by a Team Leader for failing to check patient identification under a black light for the purchase of a certain medication brought to the attention of the Team Leader and District Leader that the black

¹² The record also contains some disciplinary write-ups issued to "inventory specialists" who are also classified as techs.

¹³ I note that the disciplinary forms in the record include signature lines without any signatures. However, a majority of the disciplinary write-ups reference the date of issuance by the Team Leader to the disciplined employee and whether the disciplined employee signed or refused to sign the write-up. Moreover, as noted, the Union did not contest the Employer's evidence.

light equipment was not functioning properly. The Team Leader conducted an independent investigation, verified that the equipment was faulty, and made the determination to remove the discipline.

Discipline is issued to Team Leaders by District Leaders under the same progressive discipline policy. Team Leaders have been disciplined relative to the overall operation of their assigned pharmacy and the performance of techs. For example, discipline has issued to Team Leaders for tech performance deficiencies such as deficient data entries and failing to check patient phone calls for prescriptions. Additionally, Team Leaders have been disciplined for failing to properly schedule and adequately staff the pharmacy with techs; failing to properly budget for the tech staff; and failing to provide proper training to techs. Finally, District Leaders have issued discipline to Team Leaders for failure to carry out and meet expectations regarding their action plans¹⁴ relative to overall pharmacy performance including tech performance. Team Leaders are evaluated annually by District Leaders on the basis of their leadership skills including scheduling and staffing; hiring; team development and training; managing workflow and employee performance; and pharmacy compliance and health values. The record contains a number of year-end performance reviews of Team Leaders which specifically reference either notable or deficient tech performance which can affect the Team Leader's promotion status and wage rate. A Team Leader who receives an overall performance rating of "needs improvement" is automatically placed on a performance improvement plan which is monitored by a District Leader.

3. Authority to Transfer

Tech transfers among stores occur either via the bumping process set forth in the techs' union contract, or at the discretion of Team Leaders related to adequate staffing at the pharmacy. Team Leaders independently transfer techs out of their store to another store as well as into their store from another store in collaboration with other Team Leaders or Pharmacy Managers, sometimes with support from their District Leader and/or Store Manager. From March 2016 to May 2021, approximately 100 techs transferred into Union-represented stores from other Union and non-union represented stores and approximately 93 techs transferred out of Union-represented stores to other Union and non-union represented stores – out of these transfers, about 75 percent were at the direction of Union-represented Team Leaders.

4. Authority to Promote

Team Leaders promote techs to lead tech positions based on performance. All promotions to the lead tech position include a pay raise. From March 6, 2016, to October 11, 2020, 15 techs were promoted to lead tech by Team Leaders. The record does not detail any criteria considered by the Team Leaders in their promotion decisions or the additional responsibilities acquired by lead techs in the pharmacy

5. Authority to Assign

¹⁴ Team Leaders receive monthly "scorecards" noting performance metrics at their assigned pharmacy and are required to develop a monthly "action plan" based on such metrics.

Team Leaders are responsible for creating and inputting tech and intern work schedules into the Employer's MySchedule computer program. In deciding which shift to assign to techs, the Team Leaders assess skill sets and proficiency of techs in areas such as data entry, knowledge regarding patient/customer insurance issues, cash register proficiency, and customer service. Team Leaders generally assign more productive and higher functioning techs to day shift hours which are busier in terms of patient volume and store activity and less productive techs to night shift hours when there is less in-person activity in the pharmacy. Team Leaders also schedule break times for all techs. Team Leaders are also responsible for assigning duties to techs including data entry activities such as processing prescriptions to patient files; production duties such as retrieving medication-related items from pharmacy and store shelves, filling and labeling medication vials, and counting pills; cash register/"point-of-sale" duties; and making phone calls to patients/customers regarding continued adherence to prescribed medications. The Team Leaders likewise consider tech skill sets, proficiency and experience in determining whether to assign them to more routine "station" duties such as data entry and cash register versus more complex "non-station" duties such as making medication adherence phone calls. Team Leaders also approve and deny vacation requests for techs.

6. Secondary Indicia

Team Leaders are responsible for completing annual performance evaluations for techs and rating them as "exceeds expectations," "meets expectations," and "needs improvement." While staff pharmacists sometimes provide input to the Team Leaders regarding tech performance for purposes of annual evaluations, the Team Leaders make all final determinations regarding tech performance ratings. No input into tech evaluations is provided by District Leaders or Store Managers. A tech who receives an overall performance rating of "needs improvement" is automatically placed on a performance improvement plan (PIP)¹⁵ which is monitored by the evaluating Team Leader; all employees on a PIP are not eligible for promotion or transfer. Team Leaders also provide real-time constructive feedback and coaching to techs in addition to their scheduled formal annual performance evaluations. Like disciplinary forms, annual evaluations are generated from and stored in electronic personnel files in the MySuccess computer portal. Team Leaders, sometimes with Store Managers, attend management meetings conducted by their District Leader on a weekly, monthly, quarterly, or annual basis. Topics of discussion include new store initiatives and employee performance expectations. In Fall 2018, the Team Leaders attended an Employer-sponsored retail leadership conference with Store Managers and upper management officials.

IV. Appropriateness of Unit Clarification

A. Board Law Regarding Unit Clarification

It is a well-established principle of Board law that the Board's authority to issue certifications under Section 9(c)(1) of the Act carries with it an implied authority to police such certifications, and to clarify them as a means of effectuating the policies of the Act. Thus, the Board has developed procedures for a petition allowing clarification of a bargaining unit. Unit

¹⁵ Also referenced in the record as "improvement action plan" or "IAP."

clarification is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement, or to resolve the placement of an existing classification—either included or excluded from the unit—that has undergone recent, substantial changes in duties and responsibilities of the employees. *Union Electric Company*, 217 NLRB 666, 667 (1975). While clarification is not appropriate for upsetting an agreement between or established practice of a union and employer concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent, “where timely filed, a UC petition seeking to exclude a classification *based on supervisory status* may be processed even though the disputed classification has been historically included.” *Goddard Riverside Community Center*, 351 NLRB 1234, 1234-1235 (2007), citing *Union Electric*, 217 NLRB at 667 (emphasis added). As long as the petitioner can establish that the employees holding the disputed classification are Section 2(11) supervisors, the Board will clarify the unit to exclude those employees even “where the employees sought to be excluded by a UC petition have long been included under previous contracts, and the job duties have remained unchanged[.]” *Id.* at 1235, citing *Bethlehem Steel Corporation*, 329 NLRB 243, 244, fn. 5 (1999) and *Washington Post Company*, 254 NLRB 168, 168-169 (1981).

B. Application of Board Law Regarding Unit Clarification

The Union asserts that since its clear and unequivocal disclaimer of interest in representing the Team Leader classification on March 26, it has “repeatedly disavowed any intent to represent [the Team Leaders], and has taken no action inconsistent with its clear and unequivocal disclaimer.” Thus, the Union argues, “in the absence of any *present dispute* regarding the exclusion of the Team Leader position from the unit, the Region must dismiss the petition” as moot because there is no ambiguity to resolve (emphasis added). Contrary to the Union’s position, I find there is a “present dispute” which was created by the Union when it requested the Employer in April to execute a ratified CBA containing language that includes Team Leaders in the bargaining unit, the very classification it had just disclaimed interest in representing on March 26. While the Union may have presented some post-disclaimer evidence that it communicated its disclaimer of representation of the Team Leaders to the Employer and the affected employees, for example, by ceasing to seek dues for the Team Leaders or file grievances or unfair labor practice charges specifically on behalf of the Team Leaders, it is unable to demonstrate that its disclaimer actions are not in conflict with its insistence on representational language for the very classification it sought to disclaim and thus, its disclaimer is not clear and unequivocal.

In its brief, while acknowledging “a pre-disclaimer [CBA] *covering the Pharmacists unit*,” the Union argues there has been no evidence presented by the Employer to demonstrate that the Union has taken any action inconsistent with its disclaimer. But it is the Union’s very action of disclaiming representation of the Team Leaders *followed by* its request to the Employer to execute a ratified CBA containing representational language for the Team Leaders that constitutes the Union’s inconsistent actions regarding its disclaimer of representation. The Union’s post-disclaimer insistence that the Employer execute an agreement covering claimed Team Leaders is the core inconsistent conduct which contradicts the Union’s disclaimer of

representation and allows for the ambiguity concerning the unit placement of the Team Leaders as supervisors to be resolved by the clarification petition herein. Whether or not an agreement was reached before the Union's disclaimer does not change this finding.¹⁶ The Union's assertion that "it should be inescapably clear that [the Employer] and the Union agree that the bargaining unit does not encompass the Team Leader classification, leaving no dispute for the Region to resolve" is in direct conflict with its insistence on representational language which includes the Team Leaders.

Finally, the Union's reliance on *Concourse Village, Inc.*, 276 NLRB 12 (1985) in support of its argument that the Employer's unchallenged elimination of the Team Leader classification following the Union's disclaimer provides an independent basis for the dismissal of the clarification petition, is misplaced. As acknowledged by the Union, in *Concourse Village*, the Board dismissed an employer's clarification petition seeking to exclude certain classifications from a security guard unit based on putative supervisory status as "moot" based on the employer's actions in laying off all employees in the unit and contracting out their work. *Id.* at 12, fn. 2. While the Union argues this case shows that "dismissal of a unit clarification petition is appropriate when, as here, the classification at issue in the petition either has been or shortly will be eliminated," its argument fails to acknowledge that it was its own inconsistent actions and not any actions of the Employer that created an issue regarding the Team Leaders' representational status in the existing bargaining unit which has not been resolved.

V. Supervisory Status of the Team Leaders

A. Board Law Regarding Supervisory Status

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community*

¹⁶ In making this finding I do not consider the Union's position that an agreement on a new contract was reached between the parties before the Union purported to disclaim representation thus justifying its post-disclaimer conduct as consistent and permissible which, as noted by the Hearing Officer, is under the Region's review in the pending unfair labor practice investigations. At any rate, whether a successor CBA was reached before the Union disclaimed representation of the Team Leaders has no bearing on its subsequent post-disclaimer inconsistent conduct. That the Union presented a proposed successor CBA containing Article 11 representational language for the Team Leader classification to the Employer *before* its disclaimer does not preclude a finding that the Union's actions were inconsistent. Based on my finding, I find it unnecessary to act on the Employer's Motion to Strike on this matter that was filed after the parties filed briefs.

Care, Inc., 532 U.S. 706, 712–13 (2001) (citing *NLRB v Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)’s definition is read in the disjunctive, and thus, the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See *Children’s Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. See *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Since supervisors are excluded from the Act’s protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood*, 348 NLRB at 686). The Board requires supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Id.* at 1048.

To meet this standard, the party bearing the burden must establish that an individual “actually possesses” a supervisory power; mere inferences or conclusory statements of such power are insufficient. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. See *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Indicia other than those enumerated in Section 2(11) of the Act are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

B. Application of Board Law to the Team Leaders

The Employer asserts that the Team Leaders are statutory supervisors based on their authority to hire, discipline, discharge, transfer, promote, assign, and responsibly direct, as well as other secondary indicia of supervisory status.

1. Hiring

The undisputed record evidence presented by the Employer establishes that the Team Leaders possess authority using independent judgment to hire techs. In this regard, the Team

Leaders decide if there is a hiring need for techs based in part on monthly performance metrics provided to them regarding the performance status of their assigned store. The Team Leaders commence the hiring process by opening a requisition for hire in the computer network system and from this point forward they are directly and primarily involved in the hiring procedure – they review applicant information, decide which applicants to contact for and conduct job interviews, and make all final hiring decisions which are not subject to approval or veto. While a District Leader and/or staff pharmacist might support a Team Leader in the hiring process by, for example, sitting in on interviews of prospective techs and providing feedback, there is no record evidence of any independent review by anyone else before the Team Leader makes a decision on hiring. The overall evidence demonstrates that the Team Leader is the key participant in the hiring process. The record further demonstrates that since 2017, about 319 techs have been hired by Union-represented Team Leaders into the Employer's 33 Union-represented stores.

Based on the above, I find that the record establishes that the Team Leaders possess the authority using independent judgment to hire techs.

2. Responsible Direction and Discipline

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action and is at risk of adverse consequences for others' deficiencies. *Oakwood*, 348 NLRB at 691-692, 695. Regarding the disciplinary authority of the Team Leaders, under Section 2(11) of the Act, individuals are statutory supervisors if they have the authority, in the interest of the employer, to discipline employees or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *Id.* at 687.

The undisputed record evidence presented by the Employer demonstrates that the Team Leaders possess authority to independently discipline techs using independent judgment. In this regard, the Team Leaders have recorded, issued and documented to personnel files all steps of progressive discipline for techs. Only the Team Leaders are able to generate discipline for techs - they do not need approval from management to initiate the disciplinary process or complete a write-up. They write up employee infractions on a "Corrective Action," "Counseling," or "Performance Feedback" form on which they are designated as "supervisor" or "manager." The Team Leaders complete the entire write-up by describing the issue in writing on the form under "actual behavior"/"performance feedback details"/"actual performance/conduct"; filling out the "expected behavior/performance/conduct" and "corrective action plan"/"impact" section; filling in the "corrective action plan for improvement;" and signing it. The Team Leaders issue to and discuss discipline with the techs and transmit write-ups to employee electronic personnel file. There is no claim or evidence that discipline issued is subject to any independent review or investigation by upper management. There is no question that these write-ups completed by Team Leaders are part of the Employer's progressive discipline process.

The above discretion exercised by the Team Leaders in the disciplinary process shows they are vested with the authority to exercise independent judgment in deciding whether to

initiate the progressive disciplinary process against the techs. See *Oakwood*, 348 NLRB at 693 (“the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”). Additionally, their exercise of independent judgment in initiating the Employer’s disciplinary process constitutes a substantial role in the decision to discipline and is indeed indicative of supervisory authority. *Oak Park Nursing Care Center*, 351 NLRB 27, 29 (2007); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004). Moreover, the disciplinary write-ups issued to techs by Team Leaders appear to lay a foundation, under the progressive disciplinary system, for future discipline against techs, up to and including termination. See *Oak Park Nursing Care Center*, 351 NLRB at 28-29. Indeed, the record demonstrates that from March 2016 to May 2021, about 22 techs have been terminated by Union-represented Team Leaders for attendance infractions, ongoing performance-related issues, and violation of rules including “gross violations.”

The record further demonstrates, and I find that the Employer has met its burden in establishing that the Team Leaders are *accountable* for their actions in directing and disciplining the CNAs. Disciplinary write-ups and performance evaluations issued to Team Leaders demonstrate they have suffered negative consequences and have been held accountable for tech deficiencies such as deficient data entries and failing to check patient phone calls for prescriptions. Team Leaders have also been disciplined and held accountable for the overall operation of their assigned pharmacy including failing to properly schedule and adequately staff the pharmacy and specifically including insufficient scheduling and hiring of techs; failing to properly budget for the tech staff; and failing to provide proper training to techs. That Team Leaders rely on techs to implement their action plans also demonstrates accountability to the extent that if tech performance is deficient this can be reflected in the Team Leader’s disciplinary and/or evaluation records. Overall, the record demonstrates that the Employer has established a prospect of adverse consequences for the Team Leaders. See *Oakwood* at 691.

Based on the above, I find that the record establishes that Team Leaders possess authority to discipline techs using independent judgment and are held accountable for the techs’ performance.¹⁷

3. *Transfer*

The record contains undisputed evidence of the Team Leaders’ authority to transfer techs among store pharmacies. In this regard, tech transfers occur at the discretion of the Team Leaders in collaboration with other Team Leaders or Pharmacy Managers based on their review of pharmacy staffing needs. There is no claim or evidence that the Team Leaders’ review of staffing needs is subject to independent review by upper management. Record evidence demonstrates that from March 2016 to May 2021, approximately 100 techs transferred into Union-represented stores from other Union and non-union represented stores and approximately

¹⁷ I note that the parties’ contract language at Article 11 of their successive CBAs referencing that Team Leaders “shall not be responsible for the decision to hire, discharge or otherwise discipline *other pharmacists*,” does not reference pharmacist techs and, further, there is no substantive record evidence that the Team Leaders exercise supervisory authority with regard to anyone besides the techs. Thus, this contract language does not negate the record evidence demonstrating that Team Leaders hire, fire, and discipline techs within the meaning of Section 2(11).

93 transferred out of Union-represented stores from other Union and non-union represented stores – out of these transfers about 75 percent were, at the direction of and handled by Union-represented Team Leaders and 25 percent were via the bumping procedure set forth in the techs' CBA.

The above factors weigh in favor of finding that the Team Leaders possess authority to transfer techs using independent judgment.

4. Promote

There is some record evidence that the Team Leaders possess sole authority to promote a tech to lead tech position based on performance. In this regard, from March 6, 2016, to October 11, 2020, 15 techs were promoted to lead tech by Team Leaders. All promotions to the lead tech position include a pay raise. However, the record does not detail any criteria considered by the Team Leaders in their promotion decisions or the additional responsibilities acquired by lead techs in the pharmacy which makes this factor less conclusive.

5. Assignment of Work

The Board in *Oakwood* defined assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689. Consistent with *Kentucky River*, the *Oakwood* Board adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” *Id.* at 692. The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Id.* The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.” *Id.* at 693. (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.* at 693

Regarding the element of place, there is no record evidence about the Team Leaders assigning employees to specific areas. The overall record evidence demonstrates that all of the techs are equally trained to perform all pharmacy tech duties and does not disclose assignments by the leads with respect to place which requires them to use judgment involving a degree of discretion that rises above the “routine or clerical” as contemplated in *Oakwood*. *Id.*

As to the element of time, the undisputed record evidence demonstrates that Team Leaders are responsible for creating and inputting tech work schedules into the Employer's MySchedule computer program. In deciding which shift to assign each tech, the Team Leaders

assess their skill sets and proficiency in areas such as data entry, knowledge regarding patient/customer insurance issues, cash register proficiency, and customer service. In this regard, Team Leaders generally assign more productive and higher functioning techs to day shifts which are busier in terms of patient volume and store activity and less productive techs to shifts such as the midnight shift when there is less in-person activity in the pharmacy. These factors weigh in favor of a finding of the exercise of supervisory authority by the Team Leaders regarding the scheduling of other employees and appointing employees to a time as contemplated in *Oakwood*.

With respect to the element of duties, the undisputed record evidence demonstrates that the Team Leaders assign duties to techs including data entry activities such as processing prescriptions to patient files; production duties such as retrieving medication-related items from pharmacy and store shelves, filling and labeling medication vials, and counting pills; cash register/"point-of-sale" duties; and making phone calls to patients/customers regarding continued adherence to prescribed medications. In assigning these duties, the Team Leaders consider the skill sets, proficiency and experience of the techs in determining whether to assign them to more routine "station" duties such as data entry and cash register versus more complex "non-station" duties such as making medication adherence phone calls. However, the record overall is insufficient to demonstrate that the tech assignments are anything other than routine in nature and based on their title, rather than any particular expertise. I am not able to conclude that the direction provided to the techs by the Team Leaders requires the use of independent judgment or involves a "degree of discretion that rises above routine or clerical" as contemplated in *Oakwood. Id.* at 693.

6. Secondary Indicia

Further support for the finding of supervisory status is certain secondary indicia of supervisory status. While the Board has held that secondary indicia can be a factor in establishing supervisory status, it is well established that where putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest*, 348 NLRB at 730, fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

There is some record evidence demonstrating that the Team Leaders are responsible for completing annual performance evaluations for techs and make all final determinations regarding tech performance ratings. Further, such ratings by Team Leaders can result in issuance of a PIP during which the tech is precluded from receiving a promotion or transfer. However, the record is not further developed regarding whether such evaluations are used to determine whether a tech receives a raise given that tech wage schedules are presumably dictated by their union contract. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994); *New York University Medical Center v. NLRB*, 156 F.3d 405, 413 (2nd Cir. 1998). I also note that undisputed record evidence of the Team Leaders' participation in meetings conducted by their District Leader during which supervisory issues are discussed is undisputed secondary criteria. See, *McClatchy Newspapers, Inc.*, 307 NRB 773, 773 (1992).

CONCLUSION

Based on the above, I conclude that and that the Employer's petition for clarification is appropriate¹⁸ and that the Employer has met its burden to demonstrate that the Team leaders are statutory supervisors within the meaning of Section 2(11) of the Act and thus should be excluded from the bargaining unit represented by the Union as ordered above.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations you may obtain a request for review of this Decision by filing a request with Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67 (d) and (e) of the Board's Rules and Regulations and must be filed by **July 22, 2021**.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Chicago, Illinois this 8th day of July 2021.

/s/ **Paul Hitterman**

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¹⁸ For the reasons set forth above, the Union's motion at the hearing to dismiss the clarification petition as moot is denied.